IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 408 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MULJIBHAI KASHIBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:
MR BS PATEL for Appellants
MR RM CHAUHAN, APP for Respondents

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE J.R.VORA

Date of decision: 17/01/2002

ORAL JUDGEMENT (Per : MR.JUSTICE J.M.PANCHAL)

1. This Appeal which is filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed

against the judgment dated March 4, 1995 rendered by the learned Addl. Sessions Judge, Baroda, in Session Case No. 263 of 1994, by which the appellants are convicted of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and punished with RI for life and fine of Rs. 500/-, in default, imprisonment for 15 days.

2. Deceased Sumanben was residing with her husband Chandrakant Muljibhai Patel on first floor of a house situated in Patel Vaga of Savli town whereas the appellants who are father-in-law and sister-in-law respectively of Sumanben as also her mother-in-law were residing on the ground floor of the said building. Earlier, the marriage of deceased Sumanben had taken place with one Rajnikant Narottambhai of village Avidha, taluka Jagadiya, but the marriage had ended into divorce and thereafter the deceased had married with Chandrakant Muljibhai. The mother-in-law, father-in-law and sister-in-law of the deceased were quarreling with her regarding performance of household work by her and, therefore, the deceased was staying separate from them on the first floor of the building with her husband but even thereafter, the mother-in-law, father-in-law and the sister-in-law had continued to quarrel with the deceased. The incident in question took place on July 04, 1994. The husband of the deceased had gone to perform his duties as Home Guard and at that time the father-in-law, mother-in-law and sister-in-law of the deceased had picked up a quarrel with her. When the deceased had returned home for meal, at about 12.00 noon, the deceased had informed him about the quarrel and, therefore, the husband of the deceased had persuaded mother-in-law, father-in-law and sister-in-law of the deceased not to quarrel with the deceased and had left home again for performing duties at about 12.30 p.m. Meanwhile, the deceased had thrown dirt and sweepings on the ground and, therefore, her mother-in-law, father-in-law and sister-in-law had picked up quarrel with her. It is the case of the prosecution that the father-in-law, mother-in-law and sister-in-law of the deceased had climbed staircase and sister-in-law of the deceased had caught hold of her whereas father-in-law had poured kerosene over her and set her on fire. On receipt of burn injuries, the deceased had raised shouts and therefore those residing nearby had collected at the place of incident. Vishnubhai Muljibhai Patel, who is brother-in-law of the deceased and who was also staying in Patel Vago at Savli Town had removed the deceased to SSG Hospital, Vadodara at about 12.30 p.m. At that time, Dr. Sherbanu Azizkhan Pathan was on duty and the

deceased had informed the Doctor that she was set ablaze by her father-in-law , mother-in-law and sister-in-law after pouring kerosene over her. The information given by the deceased was entered by the Doctor in Emergency Police Register maintained at the hospital. The Doctor had found that the deceased had sustained first and second degree burns all over her body. The Doctor had thereafter informed Head Constable Kanaksing Pujabhai about the information conveyed to her by the deceased and accordingly Head Constable Kanaksing Pujabhai had made necessary entry in the Station Diary maintained at the hospital. Thereafter, he had conveyed information to Head Constable Chotubhai who was on duty at District Control Room and sent a Yadi to the Executive Magistrate for recording Dying Declaration of the deceased. On receipt of the police yadi, Executive Magistrate Nagindas Kodarlal Parekh had come to the hospital and recorded the Dying Declaration of the deceased. The deceased was thereafter shifted to the burns ward of the hospital headed by Dr. J.P. Mehta. During the course of treatment, the deceased expired on July 4, 1994. On receipt of the information regarding death of the deceased, the Investigating Officer had held inquest panchnama on the dead body of the deceased and made arrangement for sending the dead body for postmortem examination. The incriminating articles which were seized during the course of investigation were sent to the Forensic Science Laboratory for analysis. On receipt of the report of the analysis and completion of investigation, the three accused i.e. father-in-law, mother-in-law and sister-in-law of the deceased were chargesheeted in the Court of learned Judicial Magistrate, First Class, Vadodara, of the offence punishable under Sections 302 read with Section 34 of the Indian Penal Code. As the offence punishable under section 302 of the IPC is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Vadodara, for trial where it was numbered as Session Case No. 263/1994. The learned Addl. Sessions Judge, Baroda had framed charge at Exh.1 against the three accused of the offence punishable under Section 302 read with 34 of the Indian Penal Code. The charge was read over and explained to the original three accused, who had pleaded not guilty to the same and claimed to be tried. The prosecution had therefore examined (1) Sanadbhai Motibhai Rami, PW-1, Exh.8, (2) Chandrakant Chimanbhai Patel, PW-2, Exh. 10, (3) Gaurangbhai Thakorbhai, PW-3, Exh.11, (4) Sohiniben Vishnubhai Patel, PW-4, Exh.12, (5) Ranchhodbhai Jerambhai Patel, PW-5, Exh.13, (6) Nagindas Kodarlal Parekh, PW-6, Exh.14, (7) Chandrakant Muljibhai, PW-7, Exh.17, (8) Head Constable

Kanaksing Pujabhai, PW-8, Exh.20, (9) Prabhatsinh Mohansinh, PW9, Exh.24, (10) Dr. Sherbanu Azizkhan Pathan, PW-10, Exh.27, (11) Vishnubhai Muljibhai Patel, PW-11, Exh. 30, (12) Dr. Suresh Radhakrishna Naik, PW12, Exh. 31, (13) Kulsing Ramsing, PW-13, Exh. 33, (14) Dr. Sutpa Basu, PW-14, Exh. 40, (15) Kaliyansinh Joravarsinh, PW-15, Exh.42 and (16) Jivansinh Bhikhusinh Solanki, PW-16, Exh.44 to prove its case against the appellants. The prosecution had also produced documentary evidence, such as, panchnama of place of incidence at Exh. 9, Dying Declaration of the deceased recorded by the Executive Magistrate, at Exh. 16, complaint lodged by Head Constable Kanaksing Pujabhai, at Exh. 22, Yadi sent to the Executive Magistrate for recording Dying Declaration at Exh.23, Inquest panchnama at Exh. 36, postmortem notes of the deceased at Exh. 41, report of the Serologist, etc. in support of its case against the appellants. After recording of evidence of the prosecution witnesses was over, the learned Judge had explained to the accused the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statement as required by Section 313 of the Code of Criminal Procedure. In their further statements, all the three accused claimed that they had quarrel with their son Chandrakant regarding the land and therefore at the instance of Chandrkant they were falsely implicated in the case and that in fact the deceased had committed suicide. However, they had not led any evidence in support of their defence.

3. On appreciation of the evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that deceased Sumanben had died a homicidal death. At the conclusion of arguments on behalf of the prosecution, the learned APP Mr. H.L. Meghani who had conducted trial on behalf of the State had declared before the court that original accused No.2 i.e. Taraben Muljibhai, W/o original accused No.1 Muljibhai Kashibhai Patel was paralytic and was not able to move at all, and that as she was brought before the court by lifting her physically and as she was crippled, the prosecution had no case against her. The statement made by the learned Addl. Public Prosecutor was accepted by the learned Judge and it was concluded by the learned Judge that the prosecution had failed to prove its case against the original accused No.2. Thereafter, the learned Judge had proceeded to consider the case against the appellants. The learned Judge had found that the entry made by Dr. Sherbanu Azizkhan Pathan on the basis of the information conveyed to her by the deceased, in the emergency police register implicating the appellants

was reliable as well as trustworthy and that the appellants had committed murder of the deceased. The learned Judge further held that the dying declaration recorded by the Executive Magistrate was also a reliable piece of evidence and that the dying declaration of the deceased also proved that the appellants had committed the murder of the deceased. In view of the above referred to conclusions, learned Judge has acquitted original accused No.2 but convicted appellants of the offence punishable under Section 302 read with 34 of the Indian Penal Code and imposed punishments which is referred to earlier by judgment dated March 4, 1995, giving rise to the present Appeal.

4. When the appeal was called out for hearing, the learned counsel for the appellants stated at the bar that the appellant No.1 has expired and therefore the Appeal filed by him should be treated as having abated in view of the provisions of Section 394(2) of the Code of Criminal Procedure. The learned Addl. Public Prosecutor was requested to verify the statement made by the learned counsel for the appellants and the learned Addl. Public Prosecutor has produced communication dated January 11, 2002 received from the Deputy Superintendent, Baroda Central Jail, for our perusal. The same is taken on the record of the case. It indicates that while appellant No.1 was in prison, he had taken ill and was therefore removed to SSG Hospital, Vadodara, where during the course of treatment, he had died on August 26, 1996. There is no manner of doubt that the appellant No.1 has expired during the pendency of the present Appeal. Sub-sec. (1) of Sec. 394 of the Code of Criminal Procedure provides that every appeal under Section 377 or 378 shall finally abate on the death of the accused, whereas sub-sec.(2) provides that every other appeal under Chapter XXIX (except an appeal from a sentence of fine) shall finally abate on the death of the appellant. The present appeal is filed under Section 374(2) of the Code of Criminal Procedure and, therefore, in terms of the provisions of Section 394(2) of the Code, the appeal filed by the appellant No.1 is treated as having finally abated on his death.

5. Mr. B.S. Patel, learned counsel for the surviving appellant submitted that the entry made by Dr. Sherbanu Azizkhan Pathan in emergency police register on the basis of history given by the deceased is the only piece of evidence on the record which involves all the three accused and as the learned Addl. Public Prosecutor who had conducted the trial had given up case of the prosecution against the original accused No.2, the said

entry cannot be relied upon for the purpose of convicting the surviving appellant. It was claimed that the concession made at the bar by the learned Addl. Public Prosecutor before the Trial Court establishes that the entry was false so far as accused No.2 is concerned and therefore, it would not be prudent for the Court to rely upon the said entry for the purpose of convicting the surviving appellant of the offence punishable under Section 302 of the Indian Penal Code. The learned counsel for the appellant drew the attention of the Court to Exh. 29(3) which is an entry made by Dr. Sandhala, wherein the deceased had stated that she was set ablaze by her father-in-law i.e. the appellant No.1 who has expired during the pendency of the Appeal and as the said entry which is the dying declaration of the deceased is in direct conflict with the entry made by Dr. Sherbanu Azizkhan Pathan in the emergency police register, a reasonable benefit of doubt should be given to the surviving appellant. What was stressed was that the evidence of Dr. Sherbanu Azizkhan Pathan indicates that the deceased had received burn injuries over her whole body and was not able to sign or put thumb impression and, therefore, thumb impression which is appended on the dying declaration recorded by the Executive Magistrate makes the case of prosecution doubtful that the Executive Magistrate had recorded the statement of the deceased as narrated by her. Further, it was pleaded that before recording dying declaration, the Executive Magistrate had not verified from the Doctor on duty whether the deceased was physically and mentally in a fit condition to make a statement and, therefore, no reliance could have been placed on the dying declaration recorded by the Executive Magistrate for convicting the surviving appellant. The learned counsel emphasised that the three dying declarations which are on the record of the case are totally inconsistent with each other and as one dying declaration falsifies another, the appeal should be accepted. In support of his submissions, the learned counsel for the appellant has placed reliance on the decision of the Supreme in (i) STATE OF PUNJAB vs. GIAN KAUR AND ANR., AIR 1998 SC 2809; (ii) PAPARAMBAKA ROSAMMA AND OTHERS vs. STATE OF A.P., (1991) SCC 695 and (iii) LAXMI (SMT.) vs. OM PRAKASH AND OTHERS, (2001) 6 SCC 188.

6. Mr.R.M. Chauhan, learned Addl. Public Prosecutor submitted that the entry made by Dr. Sherbanu Azizkhan Pathan in emergency police register on the basis of history given by the deceased is reliable piece of evidence and, therefore, the conviction of the surviving appellant recorded by the learned Judge cannot be said to

be erroneous at all. It was stressed that the Executive Magistrate who had recorded the dying declaration of the deceased had satisfied himself that the deceased was in a fit statement of mind to make a statement and, therefore, the statement recorded by the Executive Magistrate should be acted upon by the court for the purpose of upholding conviction of the surviving appellant. What was urged by the learned Addl. Public Prosecutor was that the opinion of Dr. Sherbanu Azizkhan Pathan that the deceased was neither in a position to sign nor in a position to put thumb mark cannot outweigh the specific evidence of the Executive Magistrate to the effect that the deceased had put her thumb mark on the dying declaration and the court should not doubt the genuineness of the dying declaration recorded by the Executive Magistrate. It was further pleaded that if there are more than one dying declarations on the record, the court should accept the one which inspires confidence and as entry made by Dr. Sherbanu Azizkhan Pathan in the emergency police register on the basis of history of assault given by the deceased is a reliable piece of evidence, the conviction of the surviving appellant should be confirmed by this Court. The learned counsel referred to the evidence of the Investigating Officer and submitted that the statement recorded by the Investigating Officer of the deceased during the course of investigation should be treated as her dying declaration in view of the provisions of Sec. 162(2) of the Code of Criminal Procedure and as the said statement also involves the surviving appellant, the appeal should be dismissed.

7. We have considered the submissions advanced at the Bar by the learned counsel for the parties and re-appreciated the whole evidence on record. It needs to be mentioned that the prosecution has not led direct evidence to establish the guilt of the appellant and has relied upon the dying declarations to prove its case against the surviving appellant. The following witnesses i.e. (1) Sanadbhai M. Rami, PW1, Exh.8, (2) Chandrakant C. Patel, PW2, Exh.10,(3) Gaurangbhai Thakorbhai, PW3, Exh.11, who is neighbour, (4) Sohiniben V. Patel, PW4, Exh.12, who is also a neighbour, (5) Ranchhodbhai J. Patel, PW5, Exh.13, who is father of the deceased, (6) Chandrakant Muljibhai, PW7, Exh.17, who is husband of the deceased, and (7) Vishnubhai M. Patel, PW 11, Exh.30, a neighbour, examined by the prosecution have turned hostile and have not supported the prosecution case against the accused at all. We have carefully gone through their evidence and there is nothing in their evidence which even remotely connects the surviving appellant with the crime in question. As the evidence of

abovenamed witnesses is not helpful to the prosecution and as the same is not relied upon by the learned Additional Public Prosecutor, we have not discussed the same in detail. Before appreciating the evidence of the witnesses and the contents of the dying declaration, it would be relevant to notice the law relating to dying declaration. Section 32(1) of the Indian Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence or that unless evidence is tested by cross-examination, it is not credit worthy. Under Section 32(1) when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased called the dying declaration, falls in that category provided it has been made while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. If there are more than one dying declarations, then the Court has to scrutinise all the dying declarations to find out if each one of them passes the test of being trustworthy. The Court must further find out whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Court, it becomes very important

and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Court has to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The dying declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true; (1) Was the victim in a position to identify the assailant/s?, (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities? & (3) Whether any material part is proved to be false by other reliable evidence?

8. In the light of the above referred to principles we will now proceed to consider the evidence on record relating to dying declarations. At this stage, it needs to be mentioned that the case of the prosecution is that the surviving appellant and others had set the deceased on fire after pouring kerosene over her whereas the defence of the three accused was that the deceased had committed suicide and, therefore, the question whether the prosecution has proved beyond reasonable doubt that deceased had died a homicidal death or not will have to be answered after considering the evidentiary value of the dying declarations. Dr. Sherbanu Azizkhan Pathan, PW 10, Exh. 27 has stated in her evidence that on July 4, 1994 she was on duty at SSG Hospital as Medical Officer and at about 2.30 p.m. Vishnubhai Muljibhai had brought deceased Sumanben Chandrakant Patel for treatment of burn injuries. According to her, the deceased had given history of assault that at about 12.30 in the noon she was set on fire by her father-in-law, sister-in-law and mother-in-law after pouring kerosene. What is claimed by Dr. Sherbanu is that as this history was stated by injured herself, she had made an entry regarding the same in the emergency police register maintained at the hospital and informed the police for making arrangement so that dying declaration of the

deceased could be recorded. She has produced carbon copy of the entry made in the register at Exh.28. Dr. Sherbanu Azizkhan Pathan has further stated that she had found that the injured had sustained first and second degree burns all over her body and that she was sent to Surgery ward for the purpose of treatment. The Doctor produced medical papers relating to the treatment given to the deceased at Exh. 29. In Cross-examination, the Doctor stated that she had talked about the incident with one Ajbasinh who was Police Officer on duty and that she had conveyed the information to him regarding the entry made in the emergency police register. The Doctor admitted that in the entry made in the register no mention was made as to which accused had gone on the first floor where the deceased was staying or that the deceased was subjected to cruelty by any of the accused. The Doctor explained in her cross-examination that Vishnubhai who had brought the deceased to the hospital had introduced himself as brother of the deceased and that she was not knowing as to how many persons had accompanied the deceased when she was brought to the hospital. A specific question was put to her whether it was the practice to obtain signature of the patient on the statement made by the patient and the Doctor stated that it was never the practice to obtain the signature of the patient on the statement made by her. In answer to another question, the Doctor replied that in view of burn injuries sustained by the deceased, it was not possible to obtain her signature or to obtain her thumb impression even if it was intended to take her signature or thumb impression on the entry made in the register. The Doctor explained in the cross-examination that there were 100% burs on palms of the deceased and that she had not treated the deceased at all. The Doctor further mentioned in her deposition before the Court that the deceased has sustained 95 to 98% burn injuries and was not able to move or walk on her own.

9. From the record of the case, it is evident that the entry made by Dr. Sherbanu Azizkhan Pathan in emergency police register is the only document which involves the three accused. As noticed earlier, at the conclusion of arguments, the learned APP who had conducted the case of the prosecution before the Trial Court had declared that no case was made out by the prosecution against the original accused No.2 i.e. Taraben Muljibhai, W/o Muljibhai Kashibhai and, therefore, the learned Judge has acquitted her. Neither the statement made by the learned Addl. Public Prosecutor before the Trial Court nor the acquittal of the original accused No.2 recorded by the Trial Court is

subject matter of challenge before this Court. The effect of the statement made at the bar by the learned APP is that part of the entry made by Dr. Sherbanu was found to be false and unreliable and, therefore, the case against the original accused No.2 was not pressed. When part of the entry is not found to be reliable by the prosecution itself, we are of the opinion that it would not be prudent for the court to act upon that part of the entry which involves the surviving appellant. Further, through the evidence of Dr. Suresh Radhakrishna, PW12, Exh.31, the prosecution has produced history of assault recorded by Dr. Sandhala, which is produced on the record of the case at Exh. 29/3. In the history of assault recorded by Dr. Sandhala it was stated by the deceased that she was set ablaze by her father-in-law. In the said entry, there is no mention that the surviving appellant had caught hold of the deceased and that the father-in-law after pouring kerosene had set her ablaze. Thus, the history of assault recorded by Dr. Sandhala which must be treated as dying declaration of deceased is in direct conflict with the entry recorded by Dr. Sherbanu in emergency police register, which implicates the surviving appellant also. In view of this inconsistency, we are of the opinion that it is not safe to rely upon the entry made by Dr. Sherbanu in emergency police register for the purpose of convicting the surviving appellant under Section 302 of the Indian Penal Code. We find that the history of assault recorded by Dr. Sandhala clearly exonerates the original accused No.2 as well as the surviving appellant and, therefore, the entry made by Dr. Sherbanu cannot be relied upon for the purpose of upholding conviction of the surviving appellant under Section 302 of the IPC. So far as the dying declaration recorded by the Executive Magistrate is concerned, the Executive Magistrate i.e. Naginbhai Kodarlal, PW-6, Exh.14 has stated in his evidence that after receipt of police yadi he had gone to SSG Hospital for the purpose of recording dying declaration and that after recording dying declaration, he had obtained thumb impression of the deceased on the same. We have perused the original dying declaration which is on the record of the case at Exh.16. Thumb impression on dying declaration has clear ridges and curves. As observed earlier, Dr. Sherbanu has specifically stated before the Court that the deceased was neither in a position to sign nor in a position to put thumb mark. Under the circumstances, it becomes highly doubtful whether in fact thumb impression of the deceased was obtained by the Executive Magistrate after her statement was reduced into writing. In State of Punjab (supra), the State had questioned acquittal of the respondents of the offence

punishable under Section 302 read with 34 of the IPC. The case of the prosecution was that the respondents were not satisfied with the dowry given to the deceased by her parents at the time of her marriage and that had often led to quarrels between the accused and the deceased. The case of the prosecution was that therefore, the respondents had sprinkled kerosene on the deceased and thereafter the respondent No.1 had set her on fire by throwing a lighted match stick on her. The only evidence which was relied on by the prosecution was the dying declaration recorded by Police Officer. The dying declaration was disbelieved by the High Court on the ground that even though according to the medical evidence, the deceased had 100% burns, the thumb mark of the deceased appearing on the dying declaration had clear ridges and curves. The prosecution could not satisfactorily explain how such a thumb mark could appear on the dying declaration when the deceased had 100% burns over her body. The Supreme Court while dismissing the appeal filed by the State of Punjab has held that the High Court was right in giving benefit of doubt to the respondents. In the present case, Dr. Sherbanu has clearly stated that the deceased had 95 to 98% burns over her body and that there were 100% burns on the palms of the deceased. Further she has categorically stated that the deceased was not in a position to sign or put her thumb mark. Under the circumstances, the thumb mark on dying declaration which has clear ridges and curves makes the whole dying declaration doubtful and on the basis of such a doubtful piece of evidence, the surviving appellant cannot be convicted of the offence punishable under Sec. 302 of the IPC. Further, the evidence of the Executive Magistrate does not establish that he had tried to verify from the Doctor on duty as to whether the deceased was mentally and physically fit to make a statement. The evidence of Dr. Sherbanu would indicate that the incident in question had taken place at about 12.30 in the noon whereas the deceased was brought to the hospital for treatment at about 2.30 p.m. and thereafter the dying declaration of the deceased was recorded at 3.30 p.m. Her evidence further shows that the deceased had received 95 to 98% burns over her body and that she was not treated at all for three hours though she had sustained serious burn injuries. Under the circumstances it was absolutely necessary for the Executive Magistrate to verify whether the deceased was mentally and physically fit to make a statement. The Supreme Court in Laxmi (Smt.) (supra) has emphasized that it is essential for the prosecution to prove that the deceased was in a fit mental and physical condition to make a dying declaration and in absence of such a proof, the dying

declaration should not be acted upon more particularly if there are other infirmities. The dying declaration recorded by the Executive Magistrate is in direct conflict with the history of assault recorded by Dr. Sandhala wherein it is mentioned that the deceased was set on fire by her father-in-law as well as the entry recorded by Dr. Sherbanu in the emergency police register wherein all the three accused were implicated. Moreover, we further find that in the entry which was made by Dr. Sherbanu in emergency police register, it is mentioned that the incident had taken place at 12.30 noon whereas in the dying declaration recorded by the Executive Magistrate it is mentioned that the incident had taken place at about 1.30 p.m. and this inconsistency is not sought to be explained by any of the witnesses examined by the prosecution. Therefore the dying declaration recorded by the Executive Magistrate is not a reliable piece of evidence and cannot be acted upon for the purpose of upholding conviction of the surviving appellant under Section 302 of the IPC. Moreover, we find that the learned Judge was not justified in not exhibiting the statement of the deceased recorded during the course of investigation as her dying declaration. The statement of the deceased recorded during the course of investigation by PSI Mr. Solanki indicated the cause of her death as well as the circumstances which resulted into her death and therefore the same should have been treated as dying declaration in view of the provisions of Sec. 162(2) of the Code of Criminal Procedure. The same is therefore ordered to be exhibited at Exh. No. 50A. In this statement also it was stated by the deceased that the surviving appellant had caught hold of her from behind and that the father-in-law after pouring kerosene over her, had set her ablaze. However, this dying declaration is also in conflict with the history of assault as recorded by Dr. Sandhala wherein it was stated by the deceased herself that she was set on fire by her father-in-law. It is well settled that when there are more than one dying declarations on the record of the case, the same should be consistent with each other. The dying declarations which are on the record of the case are totally inconsistent with each other and mutually destructive. Therefore, the statement of the deceased which was recorded during the course of investigation and which is treated as dying declaration of the deceased is also of no avail to the prosecution. On re-appreciation of evidence of the prosecution witnesses, we find that except producing dying declarations, no other evidence is adduced by the prosecution to prove charge against the surviving appellant. As the dying declarations on record are not found to be reliable we are of the opinion that

the prosecution has not proved beyond reasonable doubt that the deceased had died a homicidal death and the surviving appellant is entitled to a reasonable benefit of doubt. The appeal therefore deserves to be accepted.

10. For the foregoing reasons, the appeal succeeds. the Judgment dated March 4, 1995, rendered by the learned Addl. Sessions Judge, Baroda, in Session Case No. 263/1994 by which the surviving appellant is convicted of the offence under Section 302 read with 34 of the IPC as well as punishment of RI for life and fine of Rs. 500/in default, imprisonment for 15 days is herby quashed and set aside. The jail authorities are directed to release the surviving appellant immediately unless her presence is needed with reference to any other case. The Appeal is accordingly allowed. D.S. permitted.

(J.M. Panchal, J.)

(J.R. Vora, J.)

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